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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. KEITH WAYNE HARRELL, Defendant and Appellant.	C068170 (Super. Ct. No. SF115167A)

A jury convicted defendant Keith Wayne Harrell of second degree robbery (Pen. Code,[1] §§ 211, 212.5, subd. (c)) and deadlocked as to whether he personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)). In a bifurcated proceeding, the jury found that defendant had burglary convictions in 1975, 1978, 1984, and 1990, each alleged as a prior serious felony (§ 667, subd. (a)) and a strike (§§ 667, subds. (b)-(i), 1170.12). The jury found defendant had served prior prison terms for the 1984 and 1990 burglaries. (§ 667.5, subd. (b).) He was sentenced to state prison for 45 years to life, consisting of 25 years to life for the offense plus five years each for the prior

[1] Undesignated statutory references are to the Penal Code.

serious felonies. Sentences on the prison term enhancements were stayed pursuant to section 654.[2]

On appeal, defendant contends (1) the prosecutor committed prejudicial misconduct when he vouched for prosecution witness (and former codefendant) Jaimy Martin, (2) the trial court failed to consider whether his sentence was proportionate to that of Martin, (3) the abstract of judgment must be corrected to reflect the oral pronouncement of judgment, and (4) the prison term enhancements should have been stricken rather than stayed. With regard to the vouching contention, defendant has forfeited this issue by failing to object in the trial court. Anticipating this result, defendant claims ineffective assistance of counsel by failing to object. We reject defendant's claim because defense counsel's summation provided a satisfactory explanation for not objecting in the trial court. As to his second claim, defendant also has forfeited this claim by failing to object in the trial court. Again anticipating this result, defendant claims ineffective assistance of counsel. We conclude there is no reasonable probability defense counsel could have established that defendant's sentence was excessive when compared with Martin's sentence. Next, we reject defendant's claim that the abstract of judgment does not reflect the oral pronouncement of judgment. Finally, we conclude the prison term enhancements should have been stayed. The judgment is modified to stay execution of the one-year prison term enhancements. As modified, the judgment is affirmed.

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[2] The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

FACTS

Prosecution Case-in-Chief

On a Sunday in June 2010, defendant and Martin, his friend and roommate, decided to spend the day going to garage sales and purchasing items using counterfeit bills. After visiting two garage sales, defendant pulled out a gun from under the driver's seat of his car and told Martin, "We're going to rob the next place." Martin believed defendant was serious and not joking because he seemed to be agitated, and he was acting in an aggressive manner. Martin agreed with defendant's plan.

As they drove, defendant and Martin saw signs for another garage sale. They followed the signs and ended up at the home of Quang Vo. Martin got out of the car, walked up to Vo, and said, "Give me all your money." At first, Vo thought Martin was joking. However, Martin looked back over her shoulder toward defendant, who was still sitting in the car, and told Vo that defendant had a gun. Vo looked over at the car and saw defendant holding a gun. At that point, Vo feared for his life, so he pulled all of the money out of his pockets and gave it to Martin. After getting the money, Martin hurried back to the car and defendant drove away.

Defense

The defense rested without presenting evidence or testimony.

DISCUSSION

I

Vouching for Prosecution Witness

Defendant contends the prosecutor committed prejudicial misconduct during his direct examination of Martin when he "developed the fact that Martin had pled guilty with the stipulation that she would testify truthfully at trial, and, if so, she would receive a sentence of probation (with jail time)." In defendant's view, introduction of this evidence "resulted in improper prosecution 'vouching' for a crucial prosecution witness, violating the federal constitutional right to due process." (Citing, e.g., *United States v.*

Brooks (9th Cir. 2007) 508 F.3d 1205, 1209; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1473; *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 532.)

The Attorney General counters that the claim has been forfeited because defendant did not object on the ground of prosecutorial misconduct and did not seek any admonition from the court. (E.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1262.) The Attorney General further argues that none of the exceptions for raising an objection and seeking a curative admonition apply in this case. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Anticipating the Attorney General's response, defendant claims his trial counsel's failure to object and request a curative admonition constitutes ineffective assistance. We are not persuaded.

A.

Background

During direct examination, Martin testified that when she first met with police regarding the robbery, she lied and told officers she and defendant had bought an entertainment stand at Vo's garage sale. She admitted at trial that this version of events was just "a story."

The prosecutor and Martin later had this exchange regarding her testimony:

"Q. All right. And you actually came and talked to myself and Detective Perez previous to your testimony here, correct?

"A. Yes.

"Q. You told us, essentially, the same things you're testifying to today?

"A. Yes.

"Q. You did that because of an agreement that you came to with my office?

"A. Yes.

"Q. Is that your understanding?

"A. Yes.

"Q. All right. That you would testify in exchange for -- well, that you would plead guilty also to this crime. You've pled guilty to this robbery, correct?

"A. Yes.

"Q. All right. And that in turn for that plea and for your truthful testimony in this matter, you would -- that we would recommend a sentence to the Court of a felony local 365 days in county jail; is that your understanding?

"A. Yes.

"Q. And that you would be waiving your credits in that sentence?

"A. Yes.

"Q. You understand that this testimony today is part of your agreement, correct?

"A. Yes.

"Q. Is that affecting the way you testify today?

"A. No.

"Q. Are you telling the truth?

"A. Yes.

"Q. Okay. Because you've given statements before, correct?

"A. Yes.

"Q. And they were -- some of them were different than what you're saying today; is that right?

"A. Yes.

"Q. Why is that?

"A. Because I was trying not to get caught."

Defense counsel addressed this exchange during his summation. Counsel argued: "Well, when you add it all up, she wanted to get out in a few months, a couple months, rather than a few years. That's why she said what she said. Her own self-interest. [¶] She wanted to tell you what the District Attorney wanted to hear. [¶] She had her attorney right here making sure that she would give the right answers. [¶] How much

credibility are you going to give . . . Martin? It's up to you. Just remember what she was like when she testified, how she answered questions, her motive for testifying. These are all things you need to consider. And when you consider them, I think there's reasonable doubt to what she's saying."

B.

Analysis

"'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his [or her] 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.)

"'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, defense counsel was not asked to explain why he failed to object to the alleged prosecution "vouching" for witness Martin. But one reason might have been that there was no vouching. The prosecution merely elicited information that would have come in during cross examination. In addition, defense counsel may not have objected because he wanted to use the plea agreement in closing argument. Defense counsel argued that Martin "said what she said" because she "wanted to get out in a few months."

Counsel showed that Martin had a powerful incentive to "tell [the jury] what the District Attorney wanted to hear," regardless of whether she believed it was "truthful." Defendant has not established that defense counsel was deficient.

II

Sentence Proportionality

Defendant contends the trial court erred at sentencing when it failed to perform an "intracase proportionality analysis," comparing his sentence (45 years to life) to that received by Martin (365 days), for the purpose of determining whether his sentence violated the state proscription of cruel or unusual punishment.[3] The contention is founded on *People v. Dillon* (1983) 34 Cal.3d 441, which considered, among other factors, that the defendant "received the heaviest penalty provided by law while those jointly responsible with him received the lightest -- the proverbial slap on the wrist." (*Id.* at p. 488.)

The Attorney General responds that defendant has forfeited the issue by failing to raise it at trial. (*People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5; *People v. Norman* (2003) 109 Cal.App.4th 221, 229.) We agree.

Defendant anticipates the Attorney General's argument by claiming trial counsel's failure to raise the issue constitutes ineffective assistance. However, defendant has not shown any reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. (*People v. Avena, supra,* 13 Cal.4th at p. 418.)

The premise of defendant's intracase proportionality argument is that "Martin was equally involved in the robbery." That premise is faulty because it overlooks the

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[3] Comparing defendant's sentence with Martin's sentence is like comparing apples and oranges. Defendant was sentenced following a jury trial, while Martin's reduced sentence was the result of a plea deal where she testified against defendant.

definition of robbery as a taking "accomplished by means of force or fear." (§ 211.) Here, the *only* source of force or fear was the gun. Defendant's involvement was greater than Martin's, because he supplied the gun that distinguishes robbery from other crimes of theft.

Defendant's involvement was more egregious than Martin's for two additional reasons. First, defendant originated the idea of doing the robbery. Second, the robbery was planned to maximize defendant's ability to flee the scene. Defendant remained behind the wheel of his car while Martin approached the victim on foot.

Finally, defendant was a recidivist with four prior serious felony convictions, while Martin was not.

Defendant acknowledges that, as a general proposition, trial courts are constrained to impose the punishment required by the three strikes law. (§§ 667, subds. (b)-(i), 1170.12.) However, he notes such sentences are not appropriate in all cases. (Citing *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1073, 1077 (*Carmony*).) His reliance on *Carmony* is misplaced.

In *Carmony*, this court found that a punishment of 25 years to life was grossly disproportionate to a nonviolent offense of failure to provide duplicate sex offender registration information. (*Carmony, supra*, 127 Cal.App.4th at p. 1073.) But, as defendant concedes, his violent second degree robbery is far more serious than the nonviolent registration offense. Moreover, the disparity in parole eligibility (45 years versus 25 years) is fully explained by the fact defendant has incurred four prior serious felonies.

Based on this record, there is no reasonable probability counsel could have established that defendant's sentence was "excessive" when compared with Martin's sentence. (*People v. Dillon, supra*, 34 Cal.3d at p. 488.) We conclude any deficient performance could not have been prejudicial.

III

Abstract of Judgment

In his opening brief, defendant contends the abstract of judgment must be corrected because it does not reflect the oral pronouncement of judgment. Specifically, he claims it omitted two of the four, five-year enhancements under section 667, subdivision (a).

The Attorney General responds that the abstract of judgment properly reflects the oral pronouncement. Specifically, all four of the five-year enhancements are listed on the abstract. Moreover, the two, one-year enhancements are listed as stayed.

In his reply brief, defendant acknowledges the Attorney General "may be correct." Our review of the abstract confirms that all four enhancements are properly listed. Thus, there is no error.

Defendant also claims that page 2 of the abstract of judgment incorrectly states, "Deft. sentenced to a total of 45 years to life." He notes that under section 669, the correct sentence is a determinate term of 20 years followed by an indeterminate term of 25 years to life. However, page 1 of the abstract makes plain that defendant's sentence consists of "25 years to life on counts [*sic*] 1 . . . PLUS enhancement time shown above," i.e., "20" years "0" months. The only omission is the statutory order in which the sentences shall be served. Defendant offers no authority for the proposition that the statutory sequence must be stated whenever an abstract lists both determinate and indeterminate terms. There is no error.

IV

Prison Term Enhancements

As noted, the 1984 burglary and the 1990 burglary each gave rise to a five-year enhancement (§ 667, subd. (a)) and a one-year enhancement (§ 667.5, subd. (b)). The trial court stayed the one-year enhancements pursuant to section 654.

Defendant filed a supplemental opening brief contending the stayed one-year enhancements must be stricken pursuant to *People v. Jones* (1993) 5 Cal.4th 1142 (*Jones*), which held "the voters did not specify that enhancements under sections 667 and 667.5 were both to apply to the same prior offense." (*Id*. at p. 1153.)

The Attorney General has not responded to defendant's supplemental contention.

Cases subsequent to *Jones, supra*, 5 Cal.4th 1142 have indicated the appropriate disposition under California Rules of Court, rule 4.447, is to impose and stay execution of the additional enhancement. (*People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364.) Accordingly, we modify the judgment to stay execution of the one-year enhancements pursuant to rule 4.447 rather than section 654.

DISPOSITION

The judgment is modified to stay execution of the one-year enhancements pursuant to California Rules of Court, rule 4.447. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

HOCH, J.

We concur:

HULL, Acting P. J.

MAURO, J.